In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1722

TED F. DUNHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 2-20) is reported at 475 F. 2d 1241.

JURISDICTION

The judgment of the court of appeals (Pet. App. A. 1) was entered on March 23, 1973, and a timely petition for rehearing was denied on May 23, 1973 (477 F. 2d 596, Pet. App. C. 26). The petition for a writ of certiorari was filed on June 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person who is deposed by the plaintiff in a private antitrust case thereby obtains immunity from prosecution, pursuant to the former Antitrust Immunity Statute.

2. Whether the government was "involved" in the taking of the depositions.

STATUTE INVOLVED

The former Antitrust Immunity Statute, 15 U.S.C. (1964 ed.) 32, is set forth at Pet. 3. That statute was enacted originally as a proviso to the general appropriations act of February 25, 1903, which provided in pertinent part (32 Stat. 854, 903-904):

> That for the enforcement of the provisions of the [Interstate Commerce] Act * * * the [Sherman] Act * * * and * * * [the antitrust provisions of the Wilson Tariff] Act, * * * the sum of five hundred thousand dollars * * * is hereby appropriated * * * to be expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the courts of the United States: *Provided,* That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts: *Provided further,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.[1]

STATEMENT

This petition seeks review of the judgment of the court of appeals affirming the petitioner's conviction

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[1] The portion following "*Provided*" became 15 U.S.C. (1964 ed.) 32.

for violations of Section 2 of the Sherman Act, 15 U.S.C. 2, and the Hobbs Act, 18 U.S.C. 1951.

A. The Offenses.

Petitioner Dunham is the manager and part owner of three concrete product companies in Baton Rouge, Louisiana (see Pet. App. A. 2-3). The evidence showed that he conspired with Edward Grady Partin, business manager of Teamsters Local No. 5, in an attempt to monopolize the Baton Rouge concrete products market. Partin agreed to cause labor trouble on construction jobs which did not use Dunham's products and Dunham agreed to pay Partin a fee for each cubic yard of concrete Dunham sold (App. 113-114).[2] This agreement resulted in numerous instances of labor difficulty which were not related to any legitimate labor grievance. It also resulted in the destruction of a competitor's concrete pipe in November 1967 (App. 132-134, 141-145) and an assault upon a contractor and his employees in January 1968 (App. 115-116, 134-140).

The assault occurred on January 17, 1968. When Dunham discovered that a contractor, W.O. Bergeron, was buying concrete pipe from a competitor, he called Partin and told him to "get down there and take care of him and I mean now" (App. 116). Partin sent some men to the jobsite to warn Bergeron to stop work. When Bergeron failed to heed the warning, the men returned to the Teamsters headquarters, assembled a larger crew, and equipped themselves with various

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[2] Partin was tried separately and the appeal from his conviction is now pending before the Court of Appeals for the Fifth Circuit. "App." refers to the joint appendix in the court of appeals in this case.

weapons. They then returned to the jobsite (App. 135-138).

Wade McClannahan, one of the participants in the incident, described the events at the jobsite as follows:

> We went out there and we had chains, we had ball bats, we had clubs and shotguns, and we put a pretty good whupping on the Bergeron crew. We run them off the job. W. O. Bergeron, he was shot, hit several times, and so was his employees. One colored fellow out there got hit in the hand and lost—I believe he lost a finger, maybe two fingers * * * I shot him [W. O. Bergeron] myself, and along with Mr. Sylvester. Mr. Sylvester shot him once and I shot him twice. [App. 138-139.]

Mr. McClannahan was paid $1,000, supplied by petitioner, for his activities at the Bergeron jobsite (App. 139). He was later convicted in state court for his part in the affair (App. 139-140).

B. The Civil Proceedings.

In February 1967 Altex Ready Mixed Concrete Corp., a Dunham competitor, filed a civil action against Dunham, Partin, and others seeking treble damages for antitrust violations. Dunham's deposition was taken by Altex on April 24 and July 11, 1967, and January 19, 1968 (App. 219-485). The third and last deposition, which was taken two days after the Bergeron incident, was confined to Dunham's business transactions with Bergeron and his knowledge of the incident. Dunham denied that he had any responsibility for the incident.

C. The Criminal Proceedings.

Altex representatives first approached the Antitrust Division of the Department of Justice in December

1967. An FBI investigation was requested on January 22, 1968, and a grand jury investigation was commenced on June 19, 1968 (Pet. 7). On June 20, 1969, a five count indictment was returned charging Dunham, Partin and three corporate defendants with attempting to monopolize trade in concrete products, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, and conspiring to affect commerce by attempting to obtain property through physical violence, in violation of the Hobbs Act, 18 U.S.C. 1951 (Pet. App. A. 2-3; App. 1-13).

Dunham moved to dismiss the indictment on the ground that he had received immunity from prosecution by virtue of his deposition testimony in the *Altex* suit. The district court denied the motion (Pet. App. B. 21). Dunham was subsequently found guilty on one Sherman Act count and one Hobbs Act count.

In affirming, the court of appeals opinion described the question presented as "whether a person, who testifies in a private civil antitrust suit in which the Government has no involvement, is entitled to immunity from criminal prosecution under 15 U.S.C.A. § 32" (Pet. App. A. 4). The court answered this question in the negative, holding "that Section 32 authorized immunity from criminal prosecution only to the extent that the Government actively acquiesced" (Pet. App. A. 10). Dunham filed a petition for rehearing which asserted that the government did have some "involvement" or "active acquiescence" in the *Altex* suit (Pet. 4). The court of appeals denied the petition (Pet. App. C. 26).

ARGUMENT

The decision below is correct and the petition does not present any question warranting review by this Court.

1. The decision below construes the former Antitrust Immunity Statute, 15 U.S.C. (1964 ed.) 32. This statute has been repealed and replaced by the immunity provisions of the Organized Crime Control Act of 1970, 18 U.S.C. 6001-6005. The Organized Crime Control Act provided that the former immunity provisions remain applicable to testimony given prior to December 15, 1970 (Section 260, 84 Stat. 922, 931-932). Thus, the questions raised can affect only the prosecution of persons who gave testimony in private antitrust actions prior to December 15, 1970, and the number of such persons is small.

2. The court of appeals correctly held that the former Antitrust Immunity Statute is not applicable to testimony given in private antitrust actions. As the court of appeals demonstrated, petitioner's construction of the immunity statute would be inconsistent with the wording of the statute (Pet. App. A. 5-7) and Congressional intent expressed in its legislative history (Pet. App. A. 7-8); would tend to defeat the Congressional purpose of strengthening antitrust enforcement (Pet. App. A. 8-10); and would be contrary to the views expressed by other courts (Pet. App. A. 10-11). We rely primarily on the thorough discussion by the court below, and add only the following observations:

Petitioner contends that the statute is applicable because the words "any proceeding, suit, or prosecution under sections 1-7 of this title" in 15 U.S.C. (1964 ed.) 32 are broad enough to cover private antitrust cases. This Court has previously held that the words "proceeding, suit, or prosecution" in the immunity proviso have the same meaning as the words "proceeding, suit or prosecution" in the body of the appropriation provision. *United States* v. *Welden*, 377 U.S. 95. The court of appeals found

that the words in the appropriation provision apply only to government suits and accordingly concluded that immunity is limited to testimony in government proceedings, suits, and prosecutions (Pet. App. A. 6-7).

The decision below does not conflict with the unreported order of the Court of Appeals for the Ninth Circuit in *United States* v. *Sabado-Ollero, Inc.* (Pet. App. F. 30). In that case the government filed a petition for a writ of mandamus shortly before the enactment of the Organized Crime Control Act of 1970, in order to prevent further testimony in reliance upon an erroneous order of the district court granting immunity under 15 U.S.C. (1964 ed.) 32. The potential witnesses could not assert any colorable claim of reliance on that order if they testified after the new immunity provisions became effective on December 15, 1970. The Ninth Circuit denied the petition for a writ of mandamus, but insured that a writ would be unnecessary by staying discovery until December 15.

The opinion below correctly observes that the *Sabado-Ollero* footnote reference to a witness who had testified in reliance on the district court's order granting immunity does not imply that the witness in fact had received immunity under 15 U.S.C. (1964 ed.) 32. The footnote merely indicates that the Ninth Circuit believed it would be unfair to prosecute a witness who testified in response to a court order (Pet. App. A. 12).[3]

3. Petitioner's assertion that the government was "involved" in the private litigation so that the immunity

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[3] Petitioner's reliance upon *Rutherford* v. *United States*, 365 F. 2d 353 (C.A. 9), certiorari denied, 385 U.S. 987, is also misplaced. The *Rutherford* case was a government antitrust suit.

statute should be applied to petitioner's deposition testimony is also unfounded. As previously noted, the first two depositions occurred several months before the private plaintiffs first communicated with the Antitrust Division. The third deposition, which occurred at 5:15 p.m. on Friday, January 19, 1968 (App. 462), was obviously prompted by the Bergeron incident on the preceding Wednesday, January 17. There is nothing to indicate or even suggest that the government was "involved" in any of these depositions.[4]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

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[4] The government's memorandum of October 31, 1969, which petitioner quotes (Pet. 7), states (at p. 3): "However, at no time were counsel for the Government consulted by either the plaintiff or the defendants in the private suit as to any phase of the discovery to be undertaken."